

cc: order, docket and transmittal  
letter to LASC, Case No. BC539703

JS-6

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Rosi Godinez, ) CV-14-02981-RS WL (SSx)  
Plaintiff, )  
v. ) ORDER RE: PLAINTIFF'S  
Alta-Dena Certified Dairy ) MOTION TO REMAND [8]  
LLC, Maria Flores, and Does )  
1 to 20, inclusive, )  
Defendants. )

Currently before the Court is Plaintiff Rosi Godinez's ("Plaintiff") Motion to Remand [8]. The Court, having reviewed all papers submitted pertaining to this Motion, **NOW FINDS AND RULES AS FOLLOWS:**

The Court **GRANTS** Plaintiff's Motion.

## I. BACKGROUND

## **A. Factual Background**

Plaintiff is a resident of the County of Los Angeles and a citizen of the State of California.

28 | Compl. ¶ 2. Defendant Alta-Dena Certified Dairy, LLC

1 ("Defendant Alta-Dena") is a limited liability company  
2 organized in the State of Delaware and is a citizen of  
3 Delaware, Wisconsin, and Texas. Notice of Removal  
4 3:18-4:17. Defendant Maria Flores ("Defendant Flores")  
5 is a citizen of California and is employed by Alta-Dena  
6 as a "Human Resources Business Professional." Compl. ¶  
7 4; Notice of Removal 4:20-21.

8 Plaintiff was employed as a "Quality Assurance Lab  
9 Tech" at Defendant Alta-Dena's City of Industry  
10 facility for approximately 35 years, from around 1978  
11 until her termination in 2013. Compl. ¶ 7. In the  
12 months leading up to her termination, Plaintiff  
13 suffered from physical disabilities, including a knee  
14 injury that limited her ability to work. Id. at ¶¶ 8-  
15 9. As a result, Plaintiff sought accommodations to her  
16 working environment, schedule, duties, and leave under  
17 the Fair Employment and Housing Act ("FEHA") and the  
18 California Family Rights Act ("CFRA"). Id. However,  
19 Plaintiff did not receive such accommodations. Id. at  
20 ¶ 10. Although Defendant Alta-Dena's managers knew of  
21 Plaintiff's disabilities, they did not respond  
22 favorably to her continued complaints and requests.  
23 Id. at ¶¶ 10-12. Plaintiff was terminated on October  
24 31, 2013. Id.

25 Plaintiff asserts claims against Defendant Alta-  
26 Dena for: (1) disability discrimination in violation of  
27 FEHA [Cal. Gov't Code § 12940(a)], (2) failure to  
28 provide reasonable accommodation in violation of FEHA

1 [Cal. Gov't Code § 12940(m)], (3) failure to engage in  
2 the interactive process of assessing disabilities in  
3 violation of FEHA [Cal. Gov't Code § 12940(n)], (4)  
4 violation of the CFRA [Cal. Gov't Code § 12945.2], (5)  
5 retaliation in violation of FEHA [Cal. Gov't Code §§  
6 12940(h) and 12940(i)], (6) wrongful termination in  
7 violation of public policy, (7) disability harassment  
8 in violation of FEHA [Cal. Gov't Code § 12940(j)], and  
9 (8) failure to prevent harassment discrimination and  
10 retaliation in violation of FEHA [Cal. Gov't Code §  
11 12940(k)]. Plaintiff also asserts a claim against  
12 Defendant Flores for disability harassment in violation  
13 of FEHA [Cal. Gov't Code § 12940(j)].

14 Plaintiff filed her Complaint against Defendants in  
15 Los Angeles Superior Court on March 17, 2014 and seeks  
16 nominal damages, compensatory damages, punitive  
17 damages, interest, costs of suit, attorney's fees,  
18 applicable statutory penalties, and further relief as  
19 deemed proper by the court.

20 **B. Procedural Background**

21 On April 16, 2014, Defendant Alta-Dena filed a  
22 Notice of Removal, stating that this Court has federal  
23 diversity jurisdiction over the case because Defendant  
24 Flores was fraudulently joined. Notice of Removal  
25 4:20-27. Defendant Alta-Dena asserts that in order to  
26 assert a claim for harassment against an employee such  
27 as Defendant Flores, California law requires that the  
28 harassment occur outside the scope of necessary job

1 performance. Id. Defendant Alta-Dena argues that  
2 Defendant Flores's actions-unwarranted criticism,  
3 scrutiny, reprimands, failure to engage in the  
4 interactive process, failure to provide reasonable  
5 accommodations, suspending Plaintiff from work, and  
6 terminating her employment-all took place within her  
7 role as a personnel manager. Id. As such, Defendant  
8 Alta-Dena avers that Defendant Flores's conduct cannot  
9 possibly give rise to a harassment claim. Id.  
10 Defendant Alta-Dena asserts that because Plaintiff  
11 cannot establish a cause of action for disability  
12 harassment against Defendant Flores, the joinder is a  
13 "sham" and Defendant Flores's California citizenship  
14 should be disregarded for removal purposes. Id.  
15 Because Plaintiff is a citizen of California and  
16 Defendant Alta-Dena is a citizen of Delaware,  
17 Wisconsin, and Texas, Defendant Alta-Dena asserts that  
18 the Court has diversity jurisdiction over this Action.  
19 Id.

20 The Action was removed to this Court on April 17,  
21 2014. On May 16, 2014, Plaintiff filed the present  
22 Motion to Remand [8]. Defendant Alta-Dena filed an  
23 Opposition on May 27, 2014 [9], and Plaintiff filed her  
24 Reply on June 4, 2014 [10].

25 **II. LEGAL STANDARD**

26 Removal to federal court is governed by 28 U.S.C. §  
27 1441, which states that "any civil action brought in a  
28 State court of which the district courts of the United

1 States have original jurisdiction, may be removed by  
2 the defendant or defendants." Subject matter  
3 jurisdiction may be based on diversity or the existence  
4 of a federal question, as set forth in 28 U.S.C. §§  
5 1331 and 1332. District courts have diversity  
6 jurisdiction over all civil actions between citizens of  
7 different states in which the amount in controversy  
8 exceeds \$75,000, exclusive of interest and costs. 28  
9 U.S.C. § 1332.

10 Section 1446(b) governs the timing of removal. If  
11 the case stated by the initial pleading is "removable  
12 on its face," then a defendant has thirty days from  
13 receipt of the pleading to remove the case. Carvalho  
14 v. Equifax Info. Servs., LLC, 629 F.3d 876, 885 (9th  
15 Cir. 2010) (quoting Harris v. Bankers Life & Cas. Co.,  
16 425 F.3d 689, 694 (9th Cir. 2005)). However, if no  
17 basis for removal is apparent in that pleading, the  
18 thirty-day removal period does not begin until the  
19 defendant receives "a copy of an amended pleading,  
20 motion, order or other paper" from which removability  
21 may first be ascertained. 28 U.S.C. § 1446(b).

22 The Court may remand a case to state court for lack  
23 of subject matter jurisdiction or defects in removal  
24 procedure. 28 U.S.C. § 1447(c). The party seeking  
25 removal bears the burden of establishing federal  
26 jurisdiction. Ethridge v. Harbor House Rest., 861 F.2d  
27 1389, 1393 (9th Cir. 1988). If at any time before  
28 final judgment it appears that the district court lacks

1 subject matter jurisdiction over a case that has been  
2 removed to federal court, the case must be remanded.  
3 28 U.S.C. § 1447(c). The removal statute is construed  
4 against removal jurisdiction, and federal jurisdiction  
5 must be rejected if there is any doubt as to the right  
6 of removal in the first instance. See Shamrock Oil &  
7 Gas Corp. v. Sheets, 313 U.S. 100, 108-09 (1941)  
8 (stating that removal statutes should be construed  
9 narrowly in favor of remand to protect jurisdiction of  
10 state courts).

### 11                   **III. ANALYSIS**

12       Here, Plaintiff asserts a claim against Defendant  
13 Flores for disability harassment in violation of FEHA  
14 (Cal. Gov't Code § 12940(j)). Defendant Alta-Dena  
15 removed this Action to this Court, alleging that  
16 Defendant Flores was fraudulently joined to an  
17 otherwise diverse action. Thus, Defendant Alta-Dena  
18 asserts that Defendant Flores is a "sham" defendant and  
19 that her citizenship can be ignored in this Action,  
20 which is properly before the Court on diversity  
21 grounds. Opp'n 2:6-7.

22       Fraudulent joinder is a "term of art" and "does not  
23 require an ill motive." Amarant v. Home Depot U.S.A.,  
24 Inc., No. 1:13-CV-00245-LJO (SKO), 2013 WL 3146809, at  
25 \*4 (E.D. Cal. June 18, 2013). Courts have determined  
26 that "joinder will be deemed fraudulent where the  
27 plaintiff fails to state a cause of action against the  
28 resident defendant." Id. A defendant bears a "heavy

1 burden" of showing, by clear and convincing evidence,  
 2 that the plaintiff cannot possibly assert a cause of  
 3 action against the non-diverse party in state court.  
 4 Hale v. Bank of Am., No. CV 12-10064 MMM (PJWx), 2013  
 5 WL 989968, at \*3 (C.D. Cal. Mar. 13, 2013); See also  
 6 Macey v. Allstate Prop. & Cas. Ins. Co., 220 F. Supp.  
 7 2d 1116, 1117 (N.D. Cal. 2002). The standard is  
 8 strictly construed in favor of remand; thus, any  
 9 material ambiguities must be examined in the light most  
 10 favorable to the plaintiff. Id. If a court finds that  
 11 a defendant has been fraudulently joined, the court can  
 12 ignore the defendant's citizenship for the purposes of  
 13 assessing diversity jurisdiction. Amarant, 2013 WL  
 14 3146809, at \*3.

15 **A. Defendant Alta-Dena Fails to Meet Its Burden of**  
 16 **Establishing that Plaintiff Cannot Possibly**  
 17 **Establish a FEHA Harassment Claim Against Defendant**  
 18 **Flores**

19 To state a FEHA harassment claim, an employee must  
 20 allege facts showing that workplace harassment was  
 21 "severe enough or sufficiently pervasive to alter the  
 22 conditions of employment and create a work environment  
 23 that qualifies as hostile or abusive to employees."  
 24 Hale v. Bank of Am., 2013 WL 989968, at \*4 (citing  
 25 Hughes v. Pair, 46 Cal. 4th 1035, 1043 (2009)).  
 26 Conduct is harassment when it takes place "outside the  
 27 scope of necessary job performance . . . presumably  
 28 engaged for personal gratification, because of

1 meanness, bigotry, or for other personal motives."  
2 Reno v. Baird, 18 Cal. 4th 640, 646 (1998). However,  
3 "employment-related decisions" or "personnel decisions  
4 of a plainly delegable character" cannot constitute a  
5 harassment claim. Id.

6 A plaintiff is barred from asserting a FEHA  
7 harassment claim only if the allegations obviously and  
8 undisputedly cannot lead to such a claim. Hale, 2013  
9 WL 989968, at \*5-6. In Hale, allegations that a  
10 defendant "publicly ostracized plaintiff, withheld  
11 items he gave to other employees, and harshly  
12 reprimanded her for absences" did not preclude a viable  
13 harassment claim because the allegations did not  
14 eliminate the possibility of harassing conduct outside  
15 the scope of employment. Id.; See also Roby, 47 Cal.  
16 4th at 709. In Hale, the court recognized that  
17 "depending on context, many of [the plaintiff's]  
18 alleged actions [reached] far beyond typical personnel  
19 management decisions" and can support an inference that  
20 the defendant's actions were motivated by a  
21 discriminatory animus that created a hostile work  
22 environment. Id. Because the court in Hale could not  
23 conclude with certainty that all of the plaintiff's  
24 allegations fell within the scope of employment,  
25 joinder was proper and remand was appropriate. Id.

26 Similarly here, Plaintiff advances allegations that  
27 cannot with certainty preclude a FEHA harassment claim  
28 against Defendant Flores. Here, while Defendant Alta-

1 Dena argues that remand is inappropriate because  
2 Defendant Flores's actions cannot constitute a cause of  
3 action for harassment, the Court finds this argument  
4 unpersuasive. Although personnel actions, by  
5 themselves, cannot constitute a cause of action for  
6 harassment, allegations of conduct that might extend  
7 beyond the scope of employment can give rise to a  
8 viable harassment claim. Id. Examined in the light  
9 most favorable to Plaintiff, Defendant Flores's alleged  
10 conduct, including "unwarranted criticism, scrutiny,  
11 [and] reprimands," have the potential to form the basis  
12 of a FEHA harassment claim. Compl. ¶ 61. Like the  
13 plaintiff in Hale whose allegations of reprimands and  
14 public ostracism did not clearly fall within the scope  
15 of employment, here, Plaintiff does not allege that  
16 Defendant Flores's actions took place only within the  
17 context of her job. In other words, Plaintiff's  
18 allegations against Defendant Flores could constitute  
19 conduct occurring "outside the scope of necessary job  
20 performance." See Reno, 18 Cal. 4th at 646.

21 Moreover, Defendant Alta-Dena fails to consider the  
22 possibility that Defendant Flores's conduct is  
23 sufficiently "severe" or "pervasive" to alter the  
24 conditions of Plaintiff's employment and constitute a  
25 harassment claim. Lyle, 38 Cal. 4th at 277-79.  
26 Defendant Alta-Dena omits discussion of the "severe"  
27 and "pervasive" standard altogether, concluding that  
28 the issue is "of no moment here." Opp'n 8:1-2. In

1 doing so, Defendant Alta-Dena fails to show by clear  
2 and convincing evidence that Plaintiff cannot possibly  
3 assert a cause of action for disability harassment  
4 under state law.

5 Further, the Court is not persuaded by Defendant  
6 Alta-Dena's contention that Defendant Flores cannot be  
7 held individually liable for her conduct as an employee  
8 of Alta-Dena. Although individuals are not liable for  
9 discriminatory or retaliatory acts done within the  
10 scope of employment, Cal. Gov't Code § 12940(j)(3)  
11 states that "an employee . . . is personally liable for  
12 any harassment . . . that is perpetrated by the  
13 employee, regardless of whether the employer or covered  
14 entity knows or should have known of the conduct and  
15 fails to take immediate and appropriate corrective  
16 action." See McClung v. Emp't Develop. Dep't, 34 Cal.  
17 4th 467, 470 (2004) (holding that the FEHA imposes  
18 personal liability for harassment on both supervisory  
19 and non-supervisory employees). Contrary to the  
20 assertions of Defendant Alta-Dena, Defendant Flores can  
21 in fact be held individually liable for a FEHA  
22 harassment claim, even as an Alta-Dena employee. Thus,  
23 the Court finds that Defendant Alta-Dena fails to meet  
24 its heavy burden of showing, by clear and convincing  
25 evidence, that Plaintiff cannot possibly assert a cause  
26 of action against Defendant Flores.

27 **B. Deficiencies in Plaintiff's Complaint Can Be Cured**  
28 **by Amendment**

1 Furthermore, remand is appropriate where, as here,  
2 a plaintiff can amend her complaint to include  
3 allegations sufficient for a viable state-law  
4 harassment claim. Ontiveros v. Michaels Stores, Inc.,  
5 No. CV 12-09437-MMM (FMOx), 2013 WL 815975, at \*4-5  
6 (C.D. Cal. Mar. 5, 2013). Even if Plaintiff's  
7 Complaint contains pleading defects, the Court allows  
8 Plaintiff to cure the defects and raise her state-law  
9 claims in state court. Id. at \*9.

10 In Ontiveros, removal was inappropriate because a  
11 defendant failed to establish that a plaintiff could  
12 not possibly assert a successful cause of action for  
13 harassment against a manager by providing additional  
14 facts. Id. at \*5-6; See also Burris v. AT&T Wireless,  
15 Inc., No. C 06-02904-JSW, 2006 WL 2038040, at \*2 (N.D.  
16 Cal. July 19, 2006) (citing Nickelberry v.  
17 DaimlerChrysler Corp., No. C-06-1002-MMC, 2006 WL  
18 997391, at \*1-2 (N.D. Cal. Apr. 17, 2006) (remanding  
19 action where defendant failed to demonstrate that the  
20 plaintiff could not amend to cure a pleading deficiency  
21 regarding an alleged sham defendant)). In Ontiveros,  
22 the plaintiff's examples of harassment consisted solely  
23 of actions within the scope of the defendant's  
24 employment; however, the court recognized that  
25 "purported deficiencies in the pleading [did] not  
26 demonstrate that [the defendant] [was] a sham  
27 defendant." 2013 WL 815975, at \*5-6. The court noted  
28 that because the pleadings—though deficient—did not

1 contain facts that would bar the plaintiff from  
2 providing additional factual allegations that could  
3 give rise to a viable harassment claim, remand was  
4 appropriate. Id.

5 Similarly here, Plaintiff alleges that Defendant  
6 Flores was aware of Plaintiff's disabilities and  
7 harassed Plaintiff by "unwarranted criticism, scrutiny,  
8 reprimands of Plaintiff, by failing to engage in the  
9 interactive process, by failing to provide reasonable  
10 accommodations, suspending her from work, refusing to  
11 allow her to work and earn compensation, and ultimately  
12 terminating her employment." Compl. ¶ 61. Although  
13 Defendant Alta-Dena argues that Plaintiff's allegations  
14 against Defendant Flores all fall within the scope of  
15 her employment and thus, are insufficient to form the  
16 basis of a FEHA harassment claim, Defendant Alta-Dena  
17 fails to demonstrate that Plaintiff cannot cure the  
18 deficiency through amending her Complaint. See Gill v.  
19 Hearst Pub. Co., 40 Cal. 2d 224, 228 (1953) (finding  
20 that parties can amend their pleadings when their  
21 allegations contain uncertainties or ambiguities).  
22 Thus, Plaintiff correctly argues that Defendant Alta-  
23 Dena did not meet its heavy burden of proving  
24 fraudulent joinder by "clear and convincing" evidence.  
25 See Ontiveros, 2013 WL 815975, at \*5. Because  
26 Plaintiff's joinder of Defendant Flores is proper, the  
27 Court lacks subject matter jurisdiction over this  
28 Action and **GRANTS** Plaintiff's Motion to Remand.

#### IV. CONCLUSION

In sum, the Court finds that Plaintiff's joinder of Defendant Flores is proper because Defendant Alta-Dena does not demonstrate that there is no possibility of a viable state-law claim against Defendant Flores. Because Defendant Flores is not fraudulently joined, and because Defendant Flores and Plaintiff are both citizens of California, the Court lacks subject matter jurisdiction over this Action. Thus, the Court **GRANTS** Plaintiff's Motion to Remand. **This action is hereby remanded to the Superior Court of California, County of Los Angeles, Case No. BC539703.**

14 || IT IS SO ORDERED.

15 | DATED: June 17, 2014

RONALD S.W. LEW

**HONORABLE RONALD S.W. LEW**  
Senior U.S. District Judge